


No-Fear Act



**Jane Rund**  
Assistant United States Attorney  
Eastern District of Missouri

---

---

---

---

---

---

---

---

NOTIFICATION AND FEDERAL  
EMPLOYEE  
ANTIDISCRIMINATION AND  
RETALIATION ACT  
Pub. L. No. 107-174  
116 Stat. 566  
May 15, 2002

---

---

---

---

---

---

---

---

Section 104: Effective Date

Although enacted on May 15, 2002,  
the Act was effective on October 1,  
2003

---

---

---


---

---

---

---

---



The primary purpose of the Act is to increase the accountability of federal agencies with respect to discrimination and whistleblower laws by requiring them to pay for judgments, awards, and settlements

---

---


---

---

---

---

---



Some of the Federal Agency Requirements include:

- Must reimburse the Justice Department's Judgment Fund for any discrimination and whistle blowing settlements, and for any awards and judgments reached in Federal court, out of their own budgets

---

---


---

---

---

---

---



Title II: Federal Employee Discrimination and Retaliation

- Under 201(b), the amount reimbursed to the Judgment Fund shall be paid out of the funds available for the defendant agency's operating expenses and shall exclude any monies appropriated for the enforcement of any Federal Law

---

---


---

---

---

---

---



### Section 102: Sense of Congress

- Agencies must reimburse the Judgment Fund in the following manner:
  - Financial Management Service (FMS) will provide notice to agency Chief Financial Officer within 15 days after payment from the Judgment Fund

5 C.F.R. § 724.104(a)

---

---


---

---

---

---

---



### Section 102: Sense of Congress

- Within 45 business days of notice by FMS, agencies must reimburse the Judgment Fund or contact FMS to make arrangements in writing for reimbursement

5 C.F.R. § 724.104 (b)

---

---


---

---

---

---

---



### Section 102: Sense of Congress

- Congress indicated a significant amount of its intent about the Act in this section
- For example, federal agencies shall not retaliate for judgments or settlements by reducing compensation, benefits or staff

---

---


---

---

---

---

---



### Section 102: Sense of Congress

- The mission of the agency should not be compromised to satisfy the reimbursement requirement
- Accountability is not furthered by taking unfounded disciplinary actions against managers or by violating managers procedural rights if accused of discrimination

---

---


---

---

---

---

---



### Title II: Federal Employee Discrimination and Retaliation

- Section 202 requires written notification, including on the internet, concerning the laws prohibiting discrimination and retaliation.
- Each agency shall provide training regarding rights and remedies under the anti-discrimination and anti-retaliation laws

---

---


---

---

---

---

---



Under section 203(a), each agency must submit an annual report to Congress, the EEOC, and the Attorney General. The report must include:

1. the number of cases arising under each of the laws prohibiting discrimination or retaliation in which discrimination is alleged

---

---


---

---

---

---

---



2. the status or disposition of such cases

3. the amount required to be reimbursed to the Judgment Fund for each case, separately identifying the aggregate amount attributable to the payment of attorney fees

---

---


---

---

---

---

---



4. the number of employees disciplined for discrimination, retaliation, harassment, or any other infraction of any provision of the laws preventing discrimination or retaliation

5. the data posted under Title III

---

---


---

---

---

---

---



6. a detailed description of the policy implemented by the agency relating to appropriate disciplinary actions against an employee who has been found to have discriminated against any individual or committed another prohibited personnel practice

---

---


---

---

---

---

---



7. an examination of trends, causal analysis, practical knowledge gained through experience, and any actions planned or taken to improve the agency's EEO processes, and

8. any budget adjustments necessary to comply with the reimbursement requirement

---

---

---


---

---

---

---

---



Under section 204(a) , OPM is in the process of issuing rules to implement Title II, rules to require a study to determine the best practices relating to appropriate disciplinary actions against Federal employees, and, based on the results of such study, advisory guidelines incorporating best practices that Federal agencies may follow

---

---

---


---

---

---

---

---



Under 204(b), 30 days after the issuance of the advisory guidelines, each agency shall submit to Congress, the EEOC, and the Attorney General a written statement specifying whether the agency has adopted and will fully follow such guidelines and, if not, the reasons why

---

---

---


---

---

---

---

---



- Title III relates to EEO Complaint Data Disclosure. Section 301 sets forth data to be posted on the internet by federal agencies 29 C.F.R. §§ 1614.704 and 1614.706
- In general, the data relates to the number of claims, the issues raised, the bases of discrimination, and complaint processing information

---

---

---


---

---

---

---

---



Some of the Federal Agency Requirements include:

- Must post a summary of statistical data relating to EEOC hearings and appeals filed with the EEOC – Office of Federal Operations
- Provide annual reports of status and progress to Congress, the Attorney General and the Equal Employment Opportunity Commission (EEOC)

---

---

---


---

---

---

---

---



Some of the Federal Agency Requirements include:

- Must post on its public website quarterly statistical data relating to federal sector EEO complaints filed against the agency by employees, former employees, and applicants for employment

---

---

---


---

---

---

---

---



Some of the Federal Agency Requirements include:

- Initiate timely and appropriate discipline against employees whose misconduct related to discrimination or reprisal

---

---

---


---

---

---

---

---



Some of the Federal Agency Requirements include:

- Conduct studies on the trends and causes of complaints of discrimination
- Implement new measures to improve the complaint process and the environment

---

---

---


---

---

---

---

---



Some of the Federal Agency Requirements include:

- Must notify and train all current employees about their rights under the anti-discrimination and whistleblower laws by September 30, 2005 – and must train new employees during their orientation program

---

---

---

---


---

---

---

---





Some of the Federal Agency Requirements include:

- Ensure that their managers have adequate training in the management of a diverse workforce, early and alternative conflict resolution, and essential communication skills

---

---


---

---

---

---

---



Section 206 requires several studies by GAO, including:

1. the effects of eliminating the pre-EEOC exhaustion requirements, and
2. the costs to DOJ of defending discrimination and retaliation cases

---

---


---

---

---

---

---



Q: Can a plaintiff demand his/her supervisor be disciplined?

A: No. There is no private right of action under this statute. The No Fear Act does not create or modify the remedies offered under the various employment law such as Title VII or the ADEA.

---

---


---

---

---

---

---



Q: Does No Fear require that an agency official accused of discrimination or retaliation be disciplined?

A: No. The only requirements in No Fear relating to discipline are reporting requirements.

---

---

---


---

---

---

---

---



Q: What should the accused agency manager be told?

A: That DOJ/AUSA does not represent the personal or individual interests of the manager. That the manager is not a party to the lawsuit (except in rare cases). That DOJ/AUSA represents the interests of the United States. That the agency counsel represents the interests of the agency.

---

---

---


---

---

---

---

---



Q: What if the manager asks if he/she will be disciplined as a result of the litigation?

A: You can make no guarantees. It will depend on the disciplinary policies of the particular agency, but the statute does not require that the manager be disciplined.

---

---

---


---

---

---

---

---



- A settlement agreement would not bind the agency one way or the other
- In appropriate cases, you can say that the possibility of disciplinary action is speculative at this point

---

---


---

---

---

---

---



Q: What if the agency manager asks if he or she needs his or her own lawyer?

A: The manager is not a party to the litigation in an employment case, except in very rare circumstances.

DOJ will not pay for separate counsel.

---

---


---

---

---

---

---



To the extent that the manager's interests are consistent with those of the agency, there is no need for separate representation, but it is always the manager's decision to make and you can not give the manager any legal advice in his or her individual capacity

---

---


---

---

---

---

---



**Q:** Who has settlement authority under No Fear?

**A:** The Act does not change the regulations governing settlement authority. Under 28 C.F.R 0.160, DOJ has this authority. In the event of a disagreement between DOJ and the client agency about settling a case, sec. 0.168(a) requires the dispute to be presented to the AAG.

---

---

---

---

---

---

---